



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

May 2, 1994

Honorable Frank H. Bass, Jr.
Montgomery County Attorney
Courthouse
Conroe, Texas 77301

Letter Opinion No. 94-044

Re: Extent to which a county that has accepted a municipal utility district's dedication of a road may be responsible for maintenance of a storm sewer system that lies within the right of way of the road and that was constructed by the district, or purchased by the district from the developer, before the district's dedication of the road (RQ-586)

Dear Mr. Bass:

You have asked us to advise you regarding the responsibilities of a county and a municipal utility district ("MUD") to maintain a storm water sewer system that lies within the right of way of a road and that was constructed by the MUD, or purchased by the MUD from the developer, before the MUD dedicated the road to public use. Your request letter states the factual context of your question as follows:

Numerous subdivision streets within Montgomery County have been constructed using the curb and gutter technique requiring the installation of underground storm sewer systems within the dedicated road right-of-ways. Due to the relatively large development costs of such facilities, in many instances financing has been obtained through the creation of Municipal Utility Districts . . . organized at least in part for purposes of storm water control. The construction of such facilities is sometimes undertaken directly by the MUD utilizing the proceeds of general obligation or revenue bonds, or in other instances using the proceeds of such bonds to purchase the facilities from the developer on a reimbursement basis.

Such storm sewer systems, in addition to receiving storm waters collected within the streets, provide the primary drainage system for storm water runoff from adjacent properties abutting the roadways in which the systems are placed. In some instances such storm sewer systems may discharge into major surface channels also constructed by the District. As such, these systems form an integral part of a drainage network with a considerably greater scope than that associated with drainage of the roadways alone.

There are many possible permutations of fact that would determine the respective responsibilities of the county and the MUD, so your question does not lend itself to comprehensive treatment in an attorney general opinion. We will try, however, to give you general guidance on what the responsibilities of a MUD and Montgomery County may be in regard to the maintenance of a storm sewer located within the right of way of a road that the MUD has dedicated to public use.

We will limit our consideration to the following hypothetical situation: A MUD created under chapter 54 of the Water Code has purchased from the developer or constructed a storm sewer system that lies within the right of way of a road located in Montgomery County. The storm sewer not only provides necessary drainage for the storm water runoff from the roadway itself but also serves as the primary drainage system for storm water discharged from properties abutting the roadway. The MUD has dedicated the road to public use by plat after the construction or purchase of the storm sewer and without reference to the storm sewer itself, and the county has accepted the dedication.

We first will discuss the MUD's responsibilities, which are governed by two sections of the Water Code. Section 54.012 of the Water Code establishes the following purposes of a MUD:

A district shall be created for the following purposes:

(1) *the control, storage, preservation, and distribution of its storm water and floodwater, the water of its rivers and streams for irrigation, power, and all other useful purposes;*

(2) the reclamation and irrigation of its arid, semiarid, and other land needing irrigation;

(3) *the reclamation and drainage of its overflowed land and other land needing drainage;*

(4) the conservation and development of its forests, water, and hydroelectric power;

(5) the navigation of its inland and coastal water;

(6) *the control, abatement, and change of any shortage or harmful excess of water;*

(7) the protection, preservation, and restoration of the purity and sanitary condition of water within the state; and

(8) the preservation of all natural resources of the state. [Emphasis added.]

We will assume as an additional fact that the drainage that our hypothetical storm sewer provides to the abutting land serves at least one of these statutory purposes. Section 54.201 of the Water Code provides in pertinent part as follows:

(a) A district shall have the functions, powers, authority, rights, *and duties* which will permit accomplishment of the purposes for which it was created.

(b) A district is authorized to purchase, construct, acquire, own, operate, *maintain, repair*, improve, or extend inside and outside its boundaries any and all works, improvements, facilities, plants, equipment, and appliances necessary to accomplish the purposes of its creation, including all works, improvements, facilities, plants, equipment, and appliances incident, helpful, or necessary to:

....

(3) gather, conduct, divert, and control local storm water or other local harmful excesses of water in a district....
[Emphasis added.]

Although a MUD is created for all the purposes stated in Water Code section 54.012, that provision does not *require* the MUD actually to undertake to serve all those purposes. See 36 D. BROOKS, COUNTY AND SPECIAL DISTRICT LAW § 46.74 (Texas Practice 1989) ("A municipal utility district has broad statutory authority to serve any and all of the purposes set forth in the state constitutional Conservation Amendment," Tex. Const. art. XVI, § 59). A MUD, for example, may not have land needing irrigation, see Water Code § 54.012(2), or may not have navigable waters, see *id.* § 54.012(5). In some areas, therefore, it would not be prudent or perhaps even possible to serve some of the purposes established in section 54.012. Furthermore, even if a MUD conveniently could serve one of the purposes provided in section 54.012, the MUD is not for that reason obligated by section 54.012 to undertake the accomplishment of that purpose.

On the other hand, section 54.201(a) does impose on a MUD those "duties" that will permit the accomplishment of its purposes. We interpret section 54.201(a) to mean that a MUD has the duty to cause the accomplishment of the purposes under section 54.012 that it has undertaken to serve. According to this interpretation, a MUD is not required from its inception to assume the function of draining excess storm water from its territory. Once the MUD has undertaken to construct or purchase a drainage system, however, it is authorized under section 54.201(b), and has a continuing duty under section 54.201(a), to *maintain and repair* the system so long as it owns the system or to serve the purpose of drainage through another means. The MUD may perform this drainage duty itself or may enter into an agreement with another authorized entity for the performance of the duty. This interpretation gives effect to the word *duties* in section 54.201 and thereby satisfies the cardinal requirement that every word of a statute be given effect if it is reasonable and possible to do so. See, e.g., *Perkins v. State*, 367 S.W.2d 140, 146 (Tex. 1963).

We believe the foregoing provisions impose a duty on a MUD to maintain a storm water drainage system that it has constructed or purchased and that it has not alienated.¹ In our hypothetical, however, Montgomery County has accepted the MUD's plat dedication of the road, but the language of the dedication is silent as to the underground storm sewer. You ask us to advise you regarding the extent to which the county is obligated to maintain and repair the sewer. Your request for advice raises various related questions: Does Montgomery County have any obligation at all? Is the county obligated to maintain the sewer at its current flow capacity, which will drain the abutting land as well as the roadway? Is the county obligated only to maintain the sewer sufficiently to drain the roadway without any obligation to ensure continued drainage of the abutting land?

Montgomery County is authorized and obligated by statute to maintain the public roads within its boundaries. Section 81.028 of the Local Government Code provides in part:

Each commissioners court may:

- (1) establish public ferries whenever the public interest may require;
- (2) lay out and establish, change, discontinue, close, abandon, or vacate public roads and highways;
- (3) build bridges and keep them in repair;
- (4) appoint road overseers and apportion hands; [and]
- (5) *exercise general control over all roads, highways, ferries, and bridges in their counties* [Emphasis added.]

V.T.C.S. article 6702-1, section 2.002 provides in part:

- (a) The commissioners court shall:
 - (1) order that public roads be laid out, opened, discontinued, closed, abandoned, vacated, or altered except that:
 - (A) a public road may not be *discontinued* until a new road designated by the commissioners court as a replacement road is ready to replace it;
- . . . and

¹We do not decide whether a MUD has authority to sell or otherwise alienate necessary storm water drainage facilities. *But see* Water Code § 54.214 (surplus and unneeded property of a MUD may be sold or exchanged for other property).

(C) an entire first-class or second-class road may not be *discontinued*, closed, or abandoned except on vacation or nonuse for a period of three years . . .

....

(b) The commissioners court may:

(1) make and enforce all reasonable and necessary rules and orders for the construction and maintenance of public roads except as prohibited by law . . .

....

(f) As used in this subchapter:

(1) "Discontinue" means to discontinue the *maintenance* of a public road. [Emphasis added.]

Section 2.002 thus generally empowers and obligates the commissioners court to maintain a public road in an adequate condition. See 43 TEX. JUR. 3d *Highways and Streets* § 139, at 219-20 (1985).

Several statutes expressly authorize Montgomery County to ensure that the road in question is properly drained. Section 2.102 of article 6702-1 provides in part:

(c) The commissioners court shall:

....

(2) drain public roads when necessary and have ditches cut for that purpose, taking into account the natural waterflow and causing as little injury as possible to adjacent landowners . . .

Section 3.102 of article 6702-1 provides in part:

(e)(1) The commissioners court is authorized to purchase or hire all necessary road machinery, tools, implements, teams, and labor required to grade, *drain*, or *repair* the roads of the county. The court may make all reasonable and necessary orders and regulations not in conflict with law for laying out, working, and otherwise improving the public roads, utilize the labor and money expended on the roads, and enforce the orders and regulations. [Emphasis added.]

Also, the Montgomery County Road Law provides in pertinent part:

The commissioners court of said county shall have full power and authority, and *it shall be its duty* to adopt such system for working, laying out, *draining* and *repairing* the public roads in said

county as it may deem best, and from time to time said court may change its plan or system of working. [Emphasis added.]

Acts 1901, 27th Leg., ch. 45, § 2, at 77. This law thus would require Montgomery County to drain and maintain the road in question in the manner that it considers the most appropriate.

Montgomery County has a duty under the foregoing statutes to provide drainage for the road. In draining the road, the county may not cause drainage to flow onto private land—without an easement thereon—in a concentrated form that would cause more injury to the land than would be caused by the natural flow of water thereon. *See Willacy County v. Oakes*, 239 S.W.2d 692, 694 (Tex. Civ. App.—San Antonio 1951, writ refd).

The county's acceptance of the roadway dedication created only an easement for use as a roadway, and the fee remained in the dedicator—the MUD—subject to the easement. *See Humble Oil & Refining Co. v. Blankenburg*, 235 S.W.2d 891, 893 (Tex. 1951). The dedicator retained all the rights in the land except for those necessary for the enjoyment of the roadway easement. *See Odneal v. City of Sherman*, 14 S.W. 31, 32 (Tex. 1890). The MUD therefore did not convey any rights in the storm sewer by virtue of the plat dedication except for such rights as are necessary for maintenance of the roadway. The county has the right to use and maintain the storm sewer to the extent necessary to discharge its duty of providing drainage to the roadway.

The easement in a city street is generally held to be quite comprehensive. It is not confined to the surface but extends to a depth that will enable the urban authority to do that which is done in every street, including the laying of sewer, gas and water pipes.

....

It is our opinion that in so far as the rights of the public are concerned, there is no essential difference between a rural road and a city street. In either case the responsible officials may, within the limits of the power vested in them by the Legislature, authorize the use of the subsurface for sewers, pipelines and other methods of transmission and communication that serve the public interest. . . . We recognize the right of the fee owner to use the subsurface in a manner that does not affect or impair enjoyment of the public easement

Hill Farm, Inc. v. Hill County, 436 S.W.2d 320, 321, 323 (Tex. 1969).

You raise and then dismiss the possibility that Montgomery County may have become responsible for drainage of the abutting properties because of an implied dedication of the sewer by the MUD. Dedication to public use may occur by implication if the owner of the land shows a clear intent to dedicate by acts or by words that do not amount to an express dedication but rather only a statement from which intent must be

inferred. *E.g., Hestand v. Johnson County*, 206 S.W.2d 665, 668 (Tex. Civ. App.--Waco 1947, no writ). You contend that the doctrine of implied dedication of the storm sewer would not apply to our hypothetical situation because there has been no acceptance of such dedication. We assume as fact that the county has not accepted any implied dedication of the storm sewer. If there has been an implied dedication but no acceptance,² then the MUD will be estopped to deny the dedication, but the county's drainage duties are not affected by the dedication. We believe the following discussion of an implied dedication of a city street would apply also to an implied dedication of a storm sewer that drains lands that are not being used as public roads:

A dedication may be binding as a common-law dedication against the grantor, on the ground that he is estopped from asserting rights inconsistent with his former acts or declarations, and yet not be such a dedication as will invest the municipality with control of and charge it with duty of repairing the streets sought to be dedicated, or make the municipality liable for injuries caused by the defective or unsafe condition of the streets. To charge the city with such duty and make it liable for damages resulting from defects in the street, there must be an acceptance of the dedication by the proper authority.

Poindexter v. Schaffner, 162 S.W. 22, 24 (Tex. Civ. App.--Dallas, 1913, no writ).

We conclude that in our hypothetical situation the MUD has assumed the duty under Water Code section 54.201 to maintain drainage of the abutting lands either through the existing storm sewer or by alternative means. Montgomery County, by accepting the plat roadway dedication, has assumed the duty of maintaining the road, including the duty to drain it, under V.T.C.S. article 6702-1 and the Montgomery County Road Law, Acts 1901, 27th Leg., ch. 45, § 2, at 77. The county has a roadway easement that includes rights to accomplish its drainage duty, and the MUD retains a fee interest subject to the easement and therefore has all the rights incident to fee title that are not inconsistent with the county's rights. If there has been an implied dedication of the storm drainage sewer itself, then the MUD will be estopped from acting in a manner contrary to the dedication. If the county has not accepted such implied sewer dedication, however, its drainage obligation is not affected by the dedication.

²We do not reach the issue of whether the county is authorized to accept a dedication of facilities that provide drainage service to land lying outside public roads. *But see* Tex. Const. art. VIII, § 1-a (authorizing counties to levy taxes "for construction and maintenance of Farm to Market Roads or for Flood Control"); V.T.C.S. art. 6702-1, § 4.103 (implementing Tex. Const. art. VIII, § 1-a).

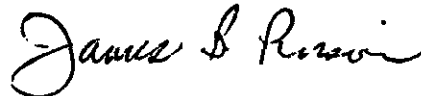
S U M M A R Y

Montgomery County has the duty to drain a road once the county has accepted a municipal utility district's dedication of the road to public use. The county has the right to use and maintain an underground storm water sewer located within the roadway easement to the extent necessary to accomplish its drainage duty.

A municipal utility district that has undertaken to construct or purchase sewer facilities that provide drainage to private lands is responsible for the continuance of such drainage, even though the facilities are located within the areal confines of a public roadway, as long as the district owns the drainage facilities. The district may perform its drainage duty either by maintenance of the sewer or by other means.

The doctrine of dedication by implication is a rule of estoppel and does not impose an obligation on the public authority unless the dedication has been accepted. Therefore, if the district has impliedly dedicated an underground storm water sewer located within the roadway easement, the district will be estopped from asserting rights inconsistent with the dedication; but the county's maintenance obligations are not affected by the dedication unless it has accepted the dedication.

Yours very truly,



James B. Pinson
Assistant Attorney General
Opinion Committee